DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-36/57429

PRELIMINARY RECITALS

Pursuant to a petition filed March 25, 2003, under Wis. Stats. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Manitowoc County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on April 24, 2003, at Manitowoc, Wisconsin.

The issue for determination is whether the Division of Hearings and Appeals may increase the asset allocation absent a demonstration that the income of the community spouse is inadequate to meet the needs of the community spouse.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

(petitioner)

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Christopher Shaw, ESS
Manitowoc County Dept Of Human Serv
926 S. 8th Street
PO Box 1177
Manitowoc, WI 54221-1177

Administrative Law Judge:
David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Manitowoc County.
2. The Petitioner's family filed the instant appeal to contest the denial of institutional MA because of assets. They hope to have the Division of Hearings and Appeals allocate more assets to the community spouse so as to qualify the Petitioner for MA.
3. The Petitioner was institutionalized on October 22, 2002.

4. At the time that the Petitioner was institutionalized she and her community spouse owned $55,645.10 of community assets. They also owned a home in which the community spouse was residing.

5. The Petitioner and her community spouse sold the home in which the community spouse was living with the closing occurring on October 31, 2002. The home was sold for $74,000 and the net proceeds to the Petitioner and her husband was $70,758.05.

6. An application for institutional MA was made on behalf of the Petitioner on January 28, 2003. An asset assessment was made. The county agency determined that the Petitioner and her community spouse had countable assets of $55645.10 on October 22, 2002. The county agency determined that the couple had an asset limit of $52,000. As the Petitioner and her husband had assets in excess of $52,000 the county agency denied the MA application.

7. The Petitioner has income in the amount of $ 70. Her husband has income in the amount of $2776.59 after tax withholding. He lives in the assisted living section of the institution in which the Petitioner resides and pays rent in the amount of $1900.

DISCUSSION

The asset limit for this case was set pursuant to "spousal impoverishment" rules. "Spousal impoverishment" rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. *Wis. Stats. §49.455(1).*

The MCCA created asset eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household so as to avoid impoverishing the community spouse. The asset limit for a single person is $2,000. When initially determining whether an institutionalized spouse is MA asset eligible, county agencies are instructed to review the combined assets of the institutionalized spouse and the community spouse. *Medicaid Eligibility Management Handbook (MEMH)*, *Appendix 23.4.1*. All available assets owned by the couple are to be considered. The determination as to the amount of countable assets is made as of the date of institutionalization. *MEMH, Appendix 23.4.1.* Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the community spouse asset limit to determine eligibility. If a couple has countable assets of less than $100,000 the community spouse is assigned a maximum of $50,000 of those assets. In 2002, if assets fell between $100,000 and $178,560 (since increased to $181,320) then the community spouse asset share was half o the total assets. *§49.455(6)(b)3, Wis. Stats. MEMH, Appendix §23.4.2.*

In this case because the Petitioner and her spouse had countable assets of less than $100,000 the county agency concluded that the asset limit was $ 52,000. The Petitioner's family seeks to increase the community spouse asset allocation to the $100,000 to $178,560 category of assets so as to increase the assets allocable to the community spouse to half of their total assets instead of the $52,000. They note that had the homestead been sold a few days earlier (before the Petitioner entered the nursing home) it would not have been an exempt asset and the asset allocation to Mr. O'Connor would have been higher – roughly $64,500 ($125,000 [$55,000 + $70,000] /2 = $62,500 plus $2000) instead of the $50,000 limit assigned by the county agency. The Petitioner's children note that they encouraged the sale so that Mr. O'Connor could move into the assisted living portion of the nursing home facility in which Mrs. O'Connor resides so that he could be closer to her.

An explanation of the spousal income and asset allocation law and policy is necessary here. If the community spouse's income falls short of his or her needs, s/he may request through a fair hearing that

the asset limit be increased so that more income can be produced. *§49.455(8)(d), Stats.* Medical assistance rules require nursing home residents to "apply their available income toward the cost of their care." §HFS 103.07(1)(d), Wis. Adm. Code. However, both Wisconsin and federal medical assistance laws contain provisions that grant an allowance to the spouse of an institutionalized person so that the spouse does not fall into poverty. *See §49.455, Wis. Stats., and 42 U.S.C. §13964-5.* The minimum monthly maintenance needs allowance in 2002 was the lesser of $2232 or $1935 plus excess shelter expenses (since increased to $2266.50 or $2020 plus excess shelter costs for 2003). *MEHM Handbook, Appendix §23.6.0.* In 2002 excess shelter costs were shelter costs above $580.50 (increased to $606.00 in 2003). *Id*. If, however, the community spouse's income falls short of his or her needs, s/he may request through an administrative hearing that the asset limit be increased so that more income can be produced for the benefit of the community spouse. The administrative law judge must assign sufficient assets to generate "enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance…" *§49.455(8)(d), Stats*. Wisconsin law, in what is referred to as the income first rule, requires that the institutionalized spouse make all of his income, except for the sum equal to the $45 personal needs allowance, available to the community spouse before the asset limit is increased. *§49.455(8)(d), Stats.; 49.45(7)(a), Stats.* Wisconsin courts had overturned this "income first rule" but just prior to the hearing conducted for this appeal the United States Supreme Court reinstated it. *Wisconsin Department of Health and Family Services v. Irene Blumer, 534 U.S. 473, 122 S. Ct. 962 (2002)* reversing and remanding *Blumer v. Wisconsin Department of Health and Family Services, 237 Wis. 2d 810, 615 N.W.2d 647 (2000).* Thus the income first rule again applies.

I must also note that the law does not permit the Division of Hearings and Appeals to exercise equitable powers; i.e., the ability to disregard policy or law based on general considerations of fairness. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977).* The Division of Hearings and Appeals must base its decisions on the law and policy governing the program involved in a particular case – here the MA program.

Applied here the above regulatory scheme means that the Division of Hearings and Appeals must follow the applicable law and policy. That law and policy requires that the county agency establish a community spouse asset share based upon the total countable assets owned by the couple on the first day of institutionalization. In this case the countable assets were under $ 100,000. The Division of Hearings and Appeals cannot, by law, decide that it is not fair to treat the homestead as an exempt asset. The Division of Hearings and Appeals can, however, increase the asset limit if income is not sufficient to meet the needs of the community spouse. That has not been demonstrated here. Thus the CSAS for this case is $52,000. As the assets of the Petitioner and her spouse are in excess of the $ 52,000 asset limit the county agency correctly denied the Petitioner's institutional MA application.

Finally, an asset allocation may be requested at any time. If the Petitioner's family believes that it can now demonstrate financial hardship such that assets must be allocated to (petitioner's spouse) so as to increase his income they mat request a new hearing and should be prepared to demonstrate the financial hardship. *MEHM, Appendix 23.4.1.*

CONCLUSIONS OF LAW

1. That the Division of Hearings and Appeals does not have the authority to increase the asset allocation absent a demonstration that the income of the community spouse is inadequate to meet the needs of the community spouse.
2. That there has been no demonstration in this case that the income of the Petitioner's community spouse is inadequate to meet his needs.

3. That the Petitioner had countable assets in excess of the MA asset limit as of the date of institutionalization thus her application for institutional MA was correctly denied.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of Milwaukee, Wisconsin, this 19th day of June, 2003

/sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals
6-15/DDF